

INVENTOR: McBride et al
TITLE: MEDICAL TESTING AND METHOD

attorney docket: CARDIOBEAT-1

REMARKS

Claims 1 and 4 through 20 are in the application.

Claims 2 and 3 were previously cancelled.

Claims 1, 4- 10, and 18-20 stand rejected under 35 U.S.C. 103(a) as unpatentable over Brown (US 5,307, 263) in view of Brown (5,879,163).

Claims 11-17 stand rejected under 35 U.S.C. 103(a) as unpatentable over Brown 263 in view of Halpern et al patent.

The claims have been amended to point out the applicability to impedance cardiography which is not shown, taught or even remotely suggested in the references. The amendments are made solely to advance prosecution of this application and are specifically not intended as any admission or concession that the rejections set forth by the Examiner are being conceded to. Applicant expressly reserves the right to reinstate the broader claims that were presented in the prior amendments and expressly reiterates that the references taken either singly or in combination do not show, teach or suggest the novel inventions that were presented in the claims prior to this amendment.

Claim 1 recites: providing non-invasive test sensors for a subject; coupling said test sensor to said subject; coupling said test sensors to impedance measuring apparatus having access to the Internet; operating said apparatus to automatically obtain test measurement impedance data from said test sensors; uploading said test measurement impedance data via the Internet to a location remote from said subject; providing a server at said remote location; processing said test measurement impedance data at said central server to produce processed impedance cardiography data; downloading said processed impedance cardiography data from said server to said apparatus, and displaying said processed impedance cardiography data at said apparatus.

The references are absolutely silent on impedance cardiography and accordingly do not show, teach or suggest applicant's novel invention as presented in claim 1 and in the remaining claims, all of which depend from claim 1.

The Examiner points to Brown '263 as showing a test sensor and coupling the test sensor to a subject. In support of this contention, the examiner points to blood glucose monitor 16 and to sensors 74. However, sensors 74 are not "test sensors".

The Examiner's attention is drawn to col. 15, line 65 through col. 16, line 35. Sensor 74 is not a test sensor. Rather, sensor 74 is described by Brown as a signal sensor. Only one signal sensor is provided per monitor. As clearly pointed out at col. 16, lines 24-35, the signal sensor 74 is merely a switch that is used to energize data management unit 10 when the monitor connected to signal sensor 74 is energized. Sensors 74 are not test sensors and no test measurement data is obtained from the sensors 74.

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Still further, since sensors 74 are not test sensors, sensors 74 are not coupled to a subject as called for in claim 1. Even further, no test measurement data is obtainable from signal sensors 74 and accordingly no apparatus automatically obtains test measurement data from the sensors as called for in claim 1. Yet further, there can be no uploading of test data from sensors as called for in claim 1 since signal sensors 74 since they are merely switches used to energize the data management unit 10.

The Examiner now points to col. 15, lines 33-34 to support his contention that Brown teaches sensors. However, *the passage pointed to by the Examiner does not, properly read, support the Examiner's contention.* The passage relied on recites in totality:

"Formatting a standardized report 56 (i.e., analyzing and processing data supplied by a blood glucose monitor 16 or other monitor or sensor) can be effected either by data management unit 10 or within the clearinghouse facility 54."

In the context of the entirety of the disclosure of the teachings of Brown, the "sensor" is not a test sensor. In fact the passage pointed to by the Examiner supports Applicant's contention that the "sensor" of Brown is not a test sensor. It is apparent that the Examiner is looking only at words and not reading the reference for how it utilizes the words to determine the context.

In addition, the Examiner points to data management unit 10 as being a "network" at Section 2, paragraph 2 where he states "coupling the test sensors to an apparatus having access to a network (fig. 1, part 10)."

Element 10 is not a network.

The Examiner takes issue with this characterization of his rejection at section 5, paragraph 2, but the Examiner has at section 2, second paragraph reiterated his position that Brown teaches "uploading the test measurement data via the network to a location remote from the subject." What exactly does the Examiner point to as a network? Applicant is left to guess what network the Examiner refers to. It is respectfully submitted that Brown does not show, teach or suggest such a network.

At no point in the Brown '263 has the undersigned found any description of data management unit 10 as a network. Data management unit 10 is a processor, not a network. The structure pointed to by the Examiner is not a network, but a direct modem connection between a processor via a modem to a server. Accordingly, the Examiner's premise that there is a coupling of sensors to apparatus having access to a network is not shown, taught or suggested.

The Examiner's attention is drawn, in particular, to MPEP 706.02(j) and MPEP 2143 and the three basic criteria that must be set out to establish a prima facie case of obviousness.

The first criteria is that "there must be some suggestion of motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings."

"Second, there must be a reasonable expectation of success."

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"Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success **must both be found in the prior art and not based on applicants disclosure.**" MPEP 2143 quoting *In re Fock*

MPEP 706.02(j) quotes *Ex Parte Clapp*: "To support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention, or the Examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to be obvious in light of the teachings of the references."

MPEP 2143.01 clearly points out that the "level of skill in the art cannot be relied upon to provide the suggestion to combine references" *Al-Site Corp. v. ISI Int'l Inc.*

MPEP 2143.01 further provides the clear guidance that: "A statement that modifications of the prior art to meet the claimed invention would have been 'well within the ordinary skill of the art at the time the claimed invention was made' because the references relied upon teach that all aspects of the claimed invention were individually known in the art is not sufficient to establish a *prima facie* case of obviousness without some objective reason to combine the teachings of the references." citing *Ex parte Levensgood*.

MPEP 2143.01 further clearly provides the guidance that the proposed modification of the prior art cannot change the principle of operation of the prior art reference.

The Examiner's attention is also directed to MPEP 2144.03 which clearly sets forth the standards, in accordance with *In re Zurko* and the other cases cited therein, for reliance on "well known" prior art. The Examiner's attention in particular is directed to 2144.03 C wherein "If applicant challenges a factual assertion as not properly officially noticed or **not properly based upon common knowledge, the Examiner must support the finding with adequate evidence.**"

The Examiner rather than following the clear guidance of the MPEP sets forth an analysis at the top of page 5 of the Office Action that finds no basis for in the MPEP. The Examiner states: "Brown happens to be the inventor of the primary reference and one of the inventors for the secondary reference. **I believe it would have been obvious to** Brown that Internet technology could be incorporated into the health monitoring system..."

The Examiner's statement of personal opinion based upon hindsight is not the proper test of obviousness. The Examiner, if he persists in this rejection, is requested to support his finding with adequate evidence.

Nothing in Brown '163 suggests or teaches that the teachings of Brown'163 apply to a Health Monitoring System. Brown '163 is directed to an education system and not a health monitoring system such as that of Brown '263. Brown '163 is in a different International and US class from Brown '263. One skilled in the art would not be lead to select the combination of references as suggested by the Examiner. Accordingly, Applicant reiterates the position that the combination of references appears to have been made solely in an effort to meet the elements of claim 1 with the use of hindsight to cobble together unrelated references.

In view of the foregoing, Brown '263 and Brown '163 taken singly or in combination do not show, teach or make obvious applicant's novel invention as set forth in claim 1.

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Claims 4-20 all depend from claim 1 and for the same reason that Brown '263 and Brown '163 do not show, teach or make obvious claim 1, claims 4-20 are not shown, taught or made obvious by Brown '263 and Brown '163.

The Examiner in rejecting claim 10 which recites, inter alia: "automatically storing processed data for test measurement data obtained at different times for said subject as said additional processed data" states that Brown '263 "teaches automatically storing processed data at different times (col. 15, lines 44-47)"

However, nothing in the cited passage supports the Examiner's contention that Brown makes such a teaching.

Accordingly, for this additional reason, claim 10 is not shown, taught or made obvious by Brown '263 in combination with Brown '163.

The Examiner in rejecting claims 18-20 cites Brown '263 as teaching "providing multimedia means at the apparatus and using the interface to communicate test instructions to the subject (col. 8, lines 63+).

The Examiner misreads Brown '263. Although Brown '263 at col. 8, lines 63+ indicates that a handheld microprocessor unit comparable to a Nintendo "game boy" may be utilized, only display information is discussed. Accordingly only a video media is used to communicate and not a multimedia as claimed. Thus, Brown '263 actually teaches away from the present invention.

Since Brown '263 fails to teach the use of the multimedia capabilities of a game boy type unit and apparently only utilizes the display portion of the device, Brown '263 also fails to teach using multimedia apparatus to communicate test instructions.

Accordingly, for these additional reasons, claims 18-20 are not shown, taught or made obvious by the Brown '263 and Brown '163 references taken singly or in combination.

Claims 11-17 depend from claim 1, and for the reasons set forth above, claims 11-17 are not shown, taught or made obvious by Brown '263 in combination with the additional references.

The Examiner cites Brown '263 as modified to include the teachings of Halpern as teaching "using an analysis program to analyze stored historical data obtained from a patient (col 11, lines 21-26)."

Once again it is pointed out that the Examiner has misread Halpern. The cited passage is absolutely silent on use of any analysis program. The passage cited states: " When the portable computer 22 requests historical data from the modules 16, the data is retrieved from the memory 84." Halpern is silent on providing analysis of historical data and using an analysis program as called for in claims 11-17.

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The Examiner improperly attempts to fill the voids in the teachings of the references at page 4 by stating without any substantiation that: "because analyzing data is well known in the art, it would have been obvious to one of ordinary skill in the art (sic), at the time of the invention to modify Brown...."

Where is the analysis program as called for in the claims? The Examiner makes an unwarranted leap in his analysis and logic that does not find any support in the references. **The Examiner, if he persists in this rejection, is requested to support his finding with adequate evidence.**

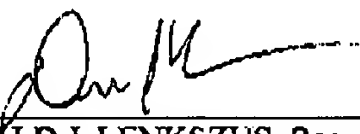
For these additional reasons, claims 11-17 are not shown, taught or made obvious by the references taken singly or in combination.

Accordingly, none of the claims in the application are shown, taught or made obvious by any of the references of record taken singly or in any combination.

In view of the foregoing comments, it is believed that all the claims presently in the application are in condition for allowance. Reexamination and reconsideration are requested. It is further requested that the claims be allowed and that this application be passed to issue. An early notice of allowance would be appreciated.

Respectfully submitted,
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Dated: January 12, 2005

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